under statutes adopting the common-law rule[22] cannot be correct. To say that what should be discharged has been discharged, may be useful; but to assume that what cannot be paid has been paid, is absurd. And in a discussion as to what the law ought to be, it is reasoning in a circle to argue that sureties contract with knowledge of what the law is,[23] and should not, therefore, be surprised at being held accountable for personal obligations as well as for official acts. The correct, and happily the more general, view is forcibly put in a recent Illinois decision. *Wachsmuth* v. *Penn Mutual Life Ins. Co.*, 89 N. E. 787 (Ill.).

CHANGE OF BUSINESS AS AFFECTING LIABILITY TO BE MADE AN INVOLUNTARY BANKRUPT. — The Bankruptcy Act of 1898 provides that, "any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading," and certain other pursuits, owing debts to the amount of one thousand dollars or over, "may be adjudged an involuntary bankrupt." [1] Under this provision, the question has frequently arisen as to the effect of a change by the debtor, prior to the petition, from an occupation of the exempt class to one of the non-exempt class, or *vice versa*. The Supreme Court has not yet passed on the question; while the decisions in the lower federal courts are so far from harmonious that there are three distinct tests, by no means consistently applied, as to the time as of which the debtor's character is to be determined. (1) The date of the petition. This accords with the literal language of the Act,[2] with the general rule of law that jurisdiction is settled as of the date of the commencement of proceedings,[3] and with the analogous cases of change of domicile;[4] and it is usually applied where the debtor is in a non-exempt class at the date of the petition.[5] The courts generally refuse, however, to grant a debtor exemption merely because he is in the exempt class on the day of the petition, even though *animo manendi*, in order to prevent an embarrassed debtor from rendering his preferential transfer unimpeachable.[6] But this departure, although reaching a desirable result, is clearly a judicial amendment of the statute. (2) The date of the act of bankruptcy. Unless this test, which is applied to a change either to a non-exempt [7] or to an exempt occupation,[8] is qualified, as intimated in some of the cases,[8] by the proviso that the debtor must have been in the exempt class both at the date of the act of bankruptcy and for a reasonable time prior thereto, it

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[22] Judge of Probate *v.* Sulloway, 68 N. H. 511.

[23] Treweek *v.* Howard, *supra*.

[1] § 4 *b*.

[2] See definition 10 in the Act, and § 4 *b*.

[3] *Cf.* Mollan *v.* Torrance, 9 Wheat. (U. S.) 537; *Re* New England Breeders' Club, 165 Fed. 517.

[4] McConnel *v.* Kelley, 138 Mass. 372. *Cf.* Robinson *v.* Hughes, 117 Ind. 293.

[5] *Re* Matson, 123 Fed. 743; *Re* Interstate Paving Co., 171 Fed. 604. See Hoffschlaeger Co. *v.* Young Nap, 12 Am. B. R. 521. *Cf.* Butcher *v.* Easto, 1 Dougl. 295.

[6] *Re* Luckhardt, 101 Fed. 807, 809.

[7] Flickinger *v.* First Nat'l Bank, 145 Fed. 162; Olive *v.* Armour & Co., 167 Fed. 517. See Tiffany *v.* La Plume Condensed Milk Co., 141 Fed. 444, 448.

[8] *Re* Luckhardt, *supra*. See *Re* Hoy, 137 Fed. 175; *Re* Pilger, 118 Fed. 206.

is objectionable as inexpedient when applied to changes to an exempt class; and in any event it is quite a stretch of the language of the statute. (3) Under early bankruptcy statutes exempting non-traders, the courts held a debtor to be non-exempt if he was in a non-exempt class at any time, either when he incurred [9] or while he owed [10] the petitioning creditor's debt. Under our present statute, there are some *dicta* adopting this harsh [11] test; [12] but the decisions do not go beyond the holding in a recent case: that where the debtor incurs debts while non-exempt, and then changes to an exempt class before the act of bankruptcy, his character is to be determined as of the time of incurring the debts and acquiring the assets scheduled.[13] *Re Burgin*, 173 Fed. 726 (Dist. Ct., N. D. Ala.). On the other hand no decision has held a debtor exempt merely because his debts were largely incurred while he was in an exempt class.[14]

The composite result of the various tests seems to be, that where the debtor is in the non-exempt class at the date of the petition, he is amenable; [15] with a possible reservation where the change was subsequent to the act of bankruptcy [16] and, perhaps, to the incurring of the greater part of the debts.[17] But where the debtor is in the exempt class at the date of the petition, the courts have refused to allow the exemption, unless he was in that class at the date of the act of bankruptcy,[18] and probably also a reasonable time prior thereto.

RELEASE OF SPECIAL POWERS IN GROSS. — A fine or recovery "ransacks the estates" of those joining in it and puts a tortious fee in the transferee.[1] The general doctrine that such a conveyance destroys a power in the grantor has been law for centuries.[2] But for almost as long a period it has been matter of controversy whether and how far a power in the holder of a particular estate to appoint a remainder to a class falls within this doctrine. An early leading case [3] laid down the sweeping proposition that a tortious conveyance extinguishes all powers appurtenant or in gross. From opposite sides two eminent text-writers struck at this result: Powel [4] denied

[9] *England:* Heylor *v.* Hall, Palmer 325; Doe *v.* Lawrence, 2 Car. & P. 134; *Re* Dagnall, 1896, 2 Q. B. 407. *United States:* See under Act of 1841, Baldwin *v.* Rosseau, Fed. Cas. 803. *Cf.* under Act of 1867, Davis *v.* Armstrong, Fed. Cas. 3, 624.

[10] Butcher *v.* Easto, *supra.*

[11] The early bankruptcy acts were quasi-criminal. See 1 Peake 91, n.

[12] Tiffany *v.* La Plume Condensed Milk Co., *supra.*

[13] Cf. Baldwin *v.* Rosseau, *supra.* The cases holding amenable corporations which have ceased all active business may be explained on this ground. *Re* C. Moench & Sons Co., 130 Fed. 685.

[14] Hoffschlaeger Co. *v.* Young Nap, 12 Am. B. R. 521, contains a *dictum* the other way. See also cases cited in notes 16 and 17, *ante.*

[15] *Re* Matson, 123 Fed. 743.

[16] Flickinger *v.* First Nat'l Bank, 145 Fed. 162. See Olive *v.* Armour & Co., 167 Fed. 517; Tiffany *v.* La Plume Condensed Milk Co., *supra.*

[17] See *Re* Luckhardt, 101 Fed. 807. But see Tiffany *v.* La Plume Condensed Milk Co., *supra.*

[18] See *Re* Pilger, 118 Fed. 206; *Re* Luckhardt, *supra.*

[1] 1 CRUISE, FINES, 3 ed., § 300; 2 *ibid.* § 234.

[2] Digges's Case, Moore Cas. 603.

[3] Edwards *v.* Sleater, Hard. 410, 416.

[4] POWEL, POWERS, 9, 32.